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No. 83-264

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CALVIN W. BURNETT,
PRESIDENT OF COPPIN STATE COLLEGE;
J. CARSON DOWELL; EDMUND C. MESTER; AND
RONALD K. DESOUZA,
VICE PRESIDENT OF STUDENT AFFAIRS, COPPIN STATE COLLEGE,
Petitioners,

v.

JAMES R. GRATTAN AND ADRIENNE S. HEDMAN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONERS

STEPHEN H. SACHS,
Attorney General of Maryland,

PAUL F. STRAIN,
Deputy Attorney General,

DIANA GRIBBON MOTZ,
CHRISTINE STEINER,
ROBERT A. ZARNOCH,
Assistant Attorneys General,
Counsel of Record,

Seven North Calvert Street,
Baltimore, Maryland 21202,
(301) 576-6338,

Counsel for Petitioners.

The Daily Record Co., Baltimore, MD 21202

QUESTION PRESENTED

When a claim of public employer discrimination is brought under 42 U.S.C. § 1983, and related civil rights statutes, is a federal appeals court free to disregard state policy, clearly reflected in its statutes and common law, that favors abbreviated limitations periods in public employment disputes and to reject such limitations periods because they govern state administrative actions or because they are too short?

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
PARTIES	2
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES	2
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	13
ARGUMENT:	
I. Maryland's Six Month Limitations Period For Filing Employment Discrimination Claims Is The Most Analogous State Limitations Period For Bias Suits Brought By Public Employees Under 42 U.S.C. § 1983 And Related Civil Rights Statutes	16
II. Application of Maryland's Six Month Limitations Period In A Federal Civil Rights Suit Alleging Employment Discrimination Furthers Important State Policies And Is Entirely Consistent With Federal Laws And Policies	28
CONCLUSION	41

TABLE OF CITATIONS

Cases

Adamson v. Davis, 47 Mo. 268 (1871)	36
Allen v. McCurry, 449 U.S. 90 (1980)	15, 26, 36, 37
Archambau v. Green, 21 Minn. 520 (1875)	36
Arnson v. Murphy, 109 U.S. 238 (1883)	39

PAGE

Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696 (1968) 14, 18

Bacharach v. United Cooperative, 181 Md. 315, 29 A.2d 822 (1943) 5

Bigelow v. Bemis, 2 Allen (Mass.) 496 (1861) 36

Board of Regents v. Tomanio, 446 U.S. 478 (1980) ..... *passim*

Briscoe v. Lahue, 103 S. Ct. 1108 (1983) 31

Burns v. Sullivan, 619 F.2d 99 (1st Cir.), *cert. denied*, 449 U.S. 893 (1980) 38

Bush v. Lucas, 103 S. Ct. 2404 (1983) 27, 31

Butz v. Economou, 438 U.S. 478 (1978) 30

Canadian Northern Ry. Co. v. Eggen, 252 U.S. 553 (1920) 39

Carlson v. Green, 446 U.S. 14 (1980) 32

City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 20

Coster v. Department of Personnel, 36 Md. App. 523, 373 A.2d 1287 (1977) 8

Curran v. Portland Super. School Committee, Etc., 435 F. Supp. 1063 (D. Maine 1977) 20

Damazo v. Wahby, 259 Md. 627, 270 A.2d 814 (1970) 23

Delaware State College v. Ricks, 449 U.S. 250 (1980) 20, 25, 26

DelCostello v. International Brotherhood of Teamsters, 103 S. Ct. 2281 (1983).....14-16, 18, 20, 25, 26, 29, 40

DeMoss v. Newton, 31 Ind. 219 (1869) 36

Duffey v. Rickard, 194 Md. 228, 71 A.2d 41 (1950) 12, 15, 23, 30

Elrod v. Burns, 427 U.S. 347 (1976) 33

Evans v. Chesapeake & Potomac Telephone Company, 535 F. Supp. 499 (D.Md. 1982) 10

PAGE

Foman v. Davis, 371 U.S. 178 (1962) 39

Forami v. Reynolds, 248 Md. 246, 236 A.2d 20 (1966) 23

George v. Gardner, 49 Ga. 441 (1873) 36

Grattan v. Burnett, 710 F.2d 160 (4th Cir. 1983) 1, 10, 12, 13

Gray v. Warden, 247 Md. 724, 234 A.2d 603 (1967) 7, 8, 24

Great American Federal Savings and Loan v. Novotny, 442 U.S. 366 (1979) 20

Gregoire v. Biddle, 77 F.2d 579 (2nd Cir. 1949), *cert. denied*, 339 U.S. 949 (1950) 31

Hanna v. Ingram, 53 N.C. 55 (1862) 36

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 16, 31

Harwood v. Marshall, 9 Md. 83 (1856) 22, 23

Heaps v. Cobb, 185 Md. 372, 45 A.2d 73 (1945) 6, 21, 22

Hecht v. Crook, 184 Md. 271, 40 A.2d 673 (1944) 21

Hochstadt v. Worcester Foundation for Experimental Biology, 545 F.2d 222 (1st Cir. 1976) 5

Imbler v. Pachtman, 424 U.S. 409 (1976) 31

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) 15, 17, 29, 32, 39

Jones v. House of Reformation, 176 Md. 43, 3 A.2d 728 (1939) 22

Kansas City Southern Ry. Co. v. Wolf, 261 U.S. 133 (1923) 26

Kremer v. Chemical Const. Co., 456 U.S. 461 (1982) 15, 16, 26, 36, 37

Local Lodge v. National Labor Relations Board, 362 U.S. 411 (1960) 16, 39

PAGE

Maine v. Thiboutot, 448 U.S. 1 (1980) 23, 24

Maryland Commission on Human Relations v. Bethlehem Steel, 295 Md. 586, 457 A.2d 1146 (1983) 7

Maryland Commission on Human Relations v. Mass Transit Administration, 294 Md. 225, 449 A.2d 385 (1982) 7

McDonald v. Santa Fe Truck Transportation Co., 427 U.S. 273 (1976) 20

McGill v. General Electric Co., 524 F. Supp. 1126 (D.Md. 1981) 10

McNeese v. Board of Education, 373 U.S. 688 (1963) 22

McNutt v. Duke Precision Dental and Orthodontic Laboratories, Inc., 698 F.2d 676 (4th Cir. 1983) 10, 11, 12, 38

Michel v. Tenney, 6 La. Ann. 89 (1851) 36

Missouri P.R. Co. v. Larabee, 234 U.S. 459 (1914) 22

Myers v. Chief of Fire Bureau, 237 Md. 583, 207 A.2d 467 (1965) 25

Ness v. Baltimore, 162 Md. 529, 160 At. 8 (1932) 21

New York Transit Authority v. Beazer, 440 U.S. 568 (1979) 33

Nicholas v. United States, 257 U.S. 71 (1921) 15, 21

Nixon v. Fitzgerald, 457 U.S. 731 (1982) 31

O'Bannon v. Louisville, Cincinnati & Lexington Railroad, 8 Bush (Ky.) 348 (1871) 36

O'Hara v. Kovens, 625 F.2d 15 (4th Cir. 1980) 17

O'Sullivan v. Felix, 233 U.S. 318 (1914) 29, 33, 39, 40

Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) 16, 34-37

	PAGE
Perry v. Sinderman, 408 U.S. 593 (1972)	33
Pierson v. Ray, 386 U.S. 547 (1967)	31
Polk County v. Dodson, 457 U.S. 312 (1981)	31
Preiser v. Rodriguez, 411 U.S. 475 (1973)	24
Pressman v. Elgin, 187 Md. 446, 50 A.2d 560 (1947)	22
Prince George's County v. Blumberg, 288 Md. 275, 418 A.2d 1155 (1980), *cert. denied*, 449 U.S. 1083 (1981)	7
Procunier v. Navarette, 434 U.S. 555 (1978)	22
Robertson v. Wegmann, 436 U.S. 584 (1978)	16, 28, 32-34, 37
Rodrigue v. Aetna Casualty and Surety Co., 395 U.S. 352 (1969)	39
Runyon v. McCrary, 427 U.S. 160 (1976)	18, 29
Scheuer v. Rhodes, 416 U.S. 232 (1974)	31
Soley v. State Commission on Human Relations, 277 Md. 521, 356 A.2d 254 (1976)	7
State Commission on Human Relations v. American Division of Litton Systems, Inc., 278 Md. 120, 360 A.2d 1 (1976)	6
State Department of Assessments v. Clark, 281 Md. 385, 380 A.2d 28 (1977)	25
State use of Isaac v. Jones, 21 Md. 432 (1863)	36
Sullivan v. LaMunyon, 572 F. Supp. 753 (D. Kan. 1983)	18
Tennessee v. Sneed, 96 U.S. 69 (1877)	39
Terry v. Anderson, 95 U.S. 628 (1877)	36
Turner v. New York, 168 U.S. 90 (1897)	39
United Parcel Service v. Mitchell, 451 U.S. 56 (1981)	11, 14, 16, 18, 20, 26, 39
United States v. Hougham, 364 U.S. 310 (1960)	39

PAGE

United States v. Kubrick, 444 U.S. 111 (1979) 29
United States ex rel. Arant v. Lane, 249 U.S. 367 (1919) 14, 15, 21, 23, 29
Walter v. Montgomery County, 179 Md. 665, 22 A.2d 472 (1941) 24
Warren v. Norman Realty Co., 513 F.2d 730 (8th Cir.), *cert. denied*, 423 U.S. 855 (1975) 19
Wheeler v. Jackson, 137 U.S. 245 (1890) 16, 39
Wood v. Carpenter, 101 U.S. 135 (1979) 15, 28
Wood v. Strickland, 420 U.S. 308 (1975) 31
Younger v. Harris, 401 U.S. 37 (1971) 32
Zipes v. TWA, 455 U.S. 385 (1982) 25

Constitutional Provisions, Statutes, Rules and Regulations

United States Constitution, Amendment 1 39
United States Code:
28 U.S.C.—
§ 1254(1) 2
29 U.S.C.—
§ 160(b) 16, 26, 30, 34, 39
42 U.S.C.—
§ 1981 ..... *passim*
§ 1983 ..... *passim*
§ 1985 ..... *passim*
§ 1986 ..... *passim*
§ 1988 ..... *passim*
§ 2000e-5 ..... *passim*
Federal Rules of Civil Procedure:
Rule 8(a) 38
Rule 15 ..... 38, 39

PAGE

Annotated Code of Maryland:
Article 27—
§ 721 30
§ 724 30
Article 49B—
§ 3 7
§ 4 6
§ 7 ..... 2, 5, 27
§ 9 ..... *passim*
§ 10 ..... 5, 6
§ 11 6
§ 12 5
§ 14 ..... 4, 27
Article 57—
§ 1 41
Article 64A—
§ 33 ..... 5, 7
§ 36 8
§ 52 5
§ 54 ..... 5, 8
Courts & Judicial Proceedings Article:
Sections—
3-401–3-415 9
3-8A-02 24
5-101 ..... 2, 13
Education Article:
Sections—
6-202 30
13-1A-01 30
14-110 30

PAGE

Laws of Maryland of 1858:
Chapter 285 22
Laws of Maryland of 1888:
Chapter 454 22
Laws of Maryland of 1983
Chapter 376 8
Maryland Rules of Procedure:
Rule B4 ..... 5, 7, 8
Rule BE44 22
Rule BF 22
Code of Maryland Regulations:
COMAR—
06.01.01.60 ..... 5, 8
06.01.03.05 8
14.03.01.07H(1) 6
14.03.01.08D(2) 7
1826 N.C. Acts ch. 65, § 3 36
1814 S.C. Publ. Stat. tit. 110 § 12 (Brevard) 36
1858 Tenn. Code § 2771 36

Miscellaneous

Annotation: Acquiescence or Delay as Affecting Rights of Public Employees Illegally Discharged, Suspended or Transferred, 145 A.L.R. 767 (1943) 15, 23, 30
Annotation: Mandamus — Allowance of Damages, 73 A.L.R.2d 903 (1960) 22
Annotation: Mandamus — Statute of Limitations, 155 A.L.R. 1144 (1945) 23
Annual Report of the Director of the Administrative Office of the United States Courts (1982) 30

PAGE

Note, Developments in the Law — Statutes of Limitations, 63 Harv. L. Rev. 1177 (1950) 28

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported as *Grattan v. Burnett*, 710 F.2d 160 (4th Cir. 1983); it is set forth in the Appendix to the Petition for a Writ of Certiorari. App. 16.[1] The opinion and order of the District Court for the District of Maryland is not reported; it is set forth in the Appendix to the Petition. App. 23.

[1] References to the Appendix to the Petition for a Writ of Certiorari are cited "App." and reference to the Joint Appendix as "A."

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on June 22, 1983. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Fourth Circuit were James R. Grattan and Adrienne S. Hedman, Appellants, and Calvin W. Burnett, President of Coppin State College; J. Carson Dowell, then Chairman of the Board of Trustees of State Universities and Colleges of Maryland; Edmund C. Mester, then Executive Director of the Board of Trustees of State Universities and Colleges of Maryland; and Ronald K. DeSouza, Vice-President of Student Affairs, Coppin State College, Appellees.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Maryland Annotated Code

Courts & Judicial Proceedings Article

§ 5-101. Three-year limitation in general.

A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced.

Art. 49B Annotated Code of Maryland

§ 7. Discrimination cases involving State agency, officer or employee.

(b) *Cases in which State agency, etc., is respondent.* — (1) In any employment discrimination case in which an agency, officer or employee of the State of Maryland is a

respondent, the rules, procedures, powers, rights, and remedies which are applicable in such a case shall be those which are applicable in a discrimination case in which a private person is the respondent.

(2) In discrimination cases in which an agency, officer or employee is a respondent, the power of the Human Relations Commission includes the authority to seek injunctive relief or judicial enforcement of its orders against such respondents. (1980, ch. 568; 1983, ch. 376.)

§ 9. Complaint to be filed with or issued by Commission; meetings of Commission.

(a) Any person claiming to be aggrieved by an alleged discrimination prohibited by any section of this article may make, sign and file with the Human Relations Commission (hereinafter referred to as the "Commission") a complaint in writing under oath. The complaint shall state the name and address of the person, firm, association, partnership, corporation, state agency, department or board alleged to have committed the act of discrimination together with the particulars thereof; and the complaint also shall contain such other information as may be required from time to time by the Commission. A complaint must be filed within six months from the date of the occurrence alleged to be a violation of this article. A complaint filed with the federal or with a local human relations commission within six months from the date of occurrence shall be deemed to have complied with the provisions of this section.

(b) Whenever the Commission has received reliable information from any individual or individuals that any person has been engaged or is engaged in any discriminatory practice within the scope of this article, and after a preliminary investigation by the Commission's staff authorized by the chairman or vice-chairman it is satisfied that said information warrants the filing of a

complaint, the Commission, on its own motion, and by action of not less than three commissioners, may issue a complaint in its name in the same manner as if the complaint had been filed by an individual.

(c) The Commission shall meet at least once each month. In addition, the chairman or a majority of the Commission shall have the right at any time to call special meetings of the Commission upon five (5) days notice to the members thereof. The Commission shall establish procedures for the conduct of said meetings.

§ 14. Declaration of policy.

It is hereby declared to be the policy of the State of Maryland, in the exercise of its police power for the protection of the public safety, public health and general welfare, for the maintenance of business and good government and for the promotion of the State's trade, commerce and manufacturers to assure all persons equal opportunity in receiving employment and in all labor management-union relations regardless of race, color, religion, ancestry or national origin, sex, age, marital status, or physical or mental handicap unrelated in nature and extent so as to reasonably preclude the performance of the employment, and to that end to prohibit discrimination in employment by any person, group, labor organization, organization or any employer or his agents.

Also relevant are the following, all of which are set forth in the Appendix to the Petition for Certiorari, App. 1-15:

42 U.S.C. § 1981

42 U.S.C. § 1983

42 U.S.C. § 1985

42 U.S.C. § 1986

42 U.S.C. § 1988

Annotated Code of Maryland, Article 49B § 10

Annotated Code of Maryland, Article 49B § 12

Annotated Code of Maryland, Article 64A § 33

Annotated Code of Maryland, Article 64A § 52

Annotated Code of Maryland, Article 64A § 54

Maryland Rules of Procedure B4a

Code of Maryland Regulations (COMAR) 06.01.01.60

STATEMENT OF THE CASE

A. *The Maryland Statutes And Regulations Applicable Here*

Under Maryland law, a state employee's exclusive state court remedies for race and sex discrimination in employment are provided by Article 49B and Article 64A of the Maryland Code.

Pursuant to Article 49B, § 7(b), a State employee may file with the Human Relations Commission ("the Commission") a complaint of race or sex discrimination in employment against "agencies, officers and employees of the State of Maryland." However, such a complaint must be filed "within six months from the date of the occurrence" of the alleged discriminatory act. Art. 49B, § 9(a).

Any time after the complaint has been filed, the Commission, and the employee (at the very least in conjunction with the Commission)[2] can go to court to seek

[2] An employee seeking to prevent lost wages is clearly a "[person] interested in the subject matter of [the] suit" so as to enable him to be a party in such an action under Maryland law. *Bachrach v. United Cooperative*, 181 Md. 315, 318, 29 A.2d 822, 824 (1943). *Cf. Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222, 226 (1st Cir. 1976) (collecting federal cases dealing with the right of an employee to seek preliminary injunction relief under 42 U.S.C. § 2000e-5(f) pending action by the Equal Employment Opportunity Commission).

a temporary injunction "to preserve the status of the parties or to prevent irreparable harm from the time the complaint is filed until the time of its final disposition." Art. 49B, § 4; *State Commission on Human Relations v. American Division of Litton Systems, Inc.*, 278 Md. 120, 122, 360 A.2d 1, 3 (1976) (reserving the issue of whether § 4 authorizes an injunction ordering reinstatement of an employee in an action brought subsequent to the termination of his employment).

After the filing of the complaint, it is investigated by the Commission's staff. Art. 49B, § 10(a). If the Commission finds "no probable cause" for believing a discriminatory act has occurred, the employee can go to court to appeal the Commission's findings, provided that the EEOC "does not have jurisdiction over the subject matter of the complaint." Art. 49B, § 10(d).[3] If probable cause is found, the Commission endeavors to conciliate a settlement agreement. Art. 49B, § 10(b) and (c). If agreement cannot be reached, the employer must answer the charges at an evidentiary hearing before a hearing examiner. Art. 49B, § 11. Although the Commission's general counsel presents evidence at the hearing, the complainant has "the right to be represented by counsel, to be present, and to participate," including the right "to examine and cross-examine witnesses, and to introduce evidence into the hearing." COMAR 14.03.01.07H(1).

If the examiner finds discrimination, the employer is ordered to cease and desist and to take affirmative action to effectuate the purposes of the Human Relations Law and may be obliged to reinstate the employee with back pay. Art. 49B, § 11(e). The Commission's general counsel, the employer and the employee have the right to appeal the examiner's decision to an Appeal Board of the

[3] Even in the absence of such an appeal mechanism, under Maryland law an employee would have the right to bring a mandamus action to review an arbitrary or illegal finding by the Commission of no probable cause. *Heaps v. Cobb*, 185 Md. 372, 45 A.2d 73 (1945).

Commission. Art. 49B, § 3(d); COMAR 14.03.01.08D(2). The Board may affirm, reverse or modify the order of the hearing examiner and that decision, if final, may be appealed on the record to the circuit court under the State Administrative Procedures Act by any party aggrieved by the Commission's order, including an employee. *Maryland Commission on Human Relations v. Mass Transit Administration*, 294 Md. 225, 230, 449 A.2d 385, 387 (1982). When the Commission's order is favorable to the employee, he or she may defend the decision against a circuit court appeal by the employer.

Under Maryland law, these remedies effectively displace any remedy the employee might have had by way of mandamus, injunction or declaratory judgment, *Maryland Commission on Human Relations v. Bethlehem Steel*, 295 Md. 586, 457 A.2d 1146 (1983); *Soley v. State Commission on Human Relations*, 277 Md. 521, 526, 356 A.2d 254, 257 (1976); *Gray v. Warden*, 247 Md. 724, 234 A.2d 603 (1967), including a claim for damages for violation of a constitutional right. *Prince George's County v. Blumberg*, 288 Md. 275, 293, 418 A.2d 1155 (1980), *cert. denied*, 449 U.S. 1083 (1981).

A classified employee of the State in a pre-termination discharge proceeding, and most unclassified employees in a post-termination grievance proceeding, may also have adjudicated the issue of whether his or her discharge was based on race, sex or other protected classifications. These grievance procedures and subsequent judicial review must also be initiated within a short time frame. Charges against a classified employee must be heard within 90 days; a decision rendered within 45 days after the hearing, Md. Code, Art. 64A, § 33; and an appeal to the circuit court of the Secretary of Personnel's decision must be taken within 30 days, Md. Rule of Procedure B4. An unclassified employee who receives a notice of termination has five working days to note an appeal to the Secretary of

Personnel who must hear the case within 30 days and render a decision within another 30 days. COMAR 06.01.01.60. Thereafter, an appeal to the circuit court must be filed within another 30 days, Md. Rule B4.[4] Under Article 64A, as under Article 49B, the administrative and judicial procedures established by law effectively displace any other State court remedy the employee would have had for the violation of his or her rights. *Gray v. Warden, supra,* 247 Md. 724, 234 A.2d 603; *Coster v. Department of Personnel,* 36 Md. App. 523, 373 A.2d 1287 (1977).[5]

B. *The Proceedings Below*

In June, 1976, administrators at Coppin State College, a predominantly black, publicly-funded institution governed by a State board, determined not to renew the employment contracts of two untenured administrative employees, the Respondents herein, James R. Grattan and Adrienne S. Hedman (hereafter the "Respondents" or "the employees"). A. 34-39. Shortly thereafter, these employees filed claims of racial discrimination with the Equal Employment Opportunity Commission, naming as respondent a state agency, Coppin State College, but no individual. App. 24. Hedman also alleged that she was the victim of sex discrimination. *Id.* Neither employee at any time filed a complaint with the Maryland Commission on Human Relations.

[4] In both categories of proceedings the employee presents his or her own case. In pretermination hearings for classified employees, the employer bears the burden of proof; in post-termination hearings for unclassified employees, the employee bears that burden. COMAR 06.01.03.05. In either case, a back pay award is obtainable. Art. 64A, §§ 36 and 54(b).

[5] At one time, a State employee's remedies under Article 49B were tied to those available under Article 64A. In 1983, a grievance notification requirement was eliminated from the law. *See* Chapter 376, Laws of 1983. Now, the remedies under both statutes are distinct.

Seven months later, on February 17, 1977, the employees did bring suit in State court against Petitioners herein, Calvin W. Burnett, the President of Coppin State College, and various other college and state officials and the Board of Trustees of the State Universities and Colleges (hereafter "Petitioners", "President Burnett" or "the State"). A. 5-10. The employees asked the State court to declare, under the Maryland Uniform Declaratory Judgment Act, Md. Code, Courts and Judicial Proceedings Article §§ 3-401–3-415, A. 5, that the non-renewal of their employment contracts in June of 1976 had been accomplished in a manner that violated State law and their rights to procedural due process. A. 6-7. The principal relief requested was reinstatement with back pay; no claim for damages was made. App. 10. The State demurred to the Bill of Complaint. App. 33.

After the demurrer was finally ruled on in 1981 and sustained with leave to amend, the employees filed, on October 13, 1981, an "Amended and Supplemental Bill of Complaint." A. 11-33. The amended complaint alleged that both employees were victims of racial discrimination in violation of 42 U.S.C. §§ 1981, 1983, 1985, 1986, and the Fourteenth Amendment of the United States Constitution and were retaliated against for exercise of their First Amendment rights. Hedman also alleged civil rights claims based on sex discrimination. For the first time, damages were claimed against the individual defendants — $1,000,000 in compensatory damages and $450,000 in punitive damages. A. 23-33. In response to this new complaint, the State removed the entire case to the United States District Court for the District of Maryland. App. 34. At that time, already pending in District Court was a separate action (an outgrowth of the EEOC complaint) filed by Hedman against the State claiming unlawful employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Grattan filed

a similar, separate Title VII action shortly thereafter. App. 24.

The State agreed to consolidate the cases and moved to dismiss all three. The District Court (Judge Norman P. Ramsey), however, refused to consolidate or to dismiss the Title VII cases and these are still pending in the District Court. App. 40. However, the Court did dismiss the removed case, finding, as President Burnett had argued, A. 39, that it was untimely filed. App. 32-40. The Court reasoned that rights and remedies provided by Maryland's Human Relations Law (Article 49B) were most analogous to the asserted federal claims and thus, the limitations period most appropriate for adoption by the district court was Article 49B, § 9(a), which requires all employment discrimination complaints to be filed with the Maryland Commission on Human Relations within six months of their occurrence. App. 34-35.[6] Since the federal claims were not brought within this period they were dismissed as not timely filed. *Id.*[7]

The employees appealed and the United States Court of Appeals for the Fourth Circuit reversed. App. 16-22. *Grattan v. Burnett*, 710 F.2d 160 (4th Cir. 1983). First, relying upon *McNutt v. Duke Precision Dental and Orthodontic Laboratories, Inc.*, 698 F.2d 676, 678 (4th Cir.

[6] In so doing the District Court followed several earlier Maryland cases involving suits brought under § 1981. *See e.g., McGill v. General Electric Co.*, 524 F. Supp. 1126 (D. Md. 1981). At the time, the Maryland district courts, like other courts throughout the country, were divided on the question of whether time periods specified in state fair employment practices laws should serve as limitations periods in federal civil rights action. *See Evans v. Chesapeake & Potomac Telephone Company*, 535 F. Supp. 499 (D. Md. 1982).

[7] The District Court ruled that the employees' free speech claim was governed by a three year limitations period but held it barred as well since it was not raised until 1981 and therefore did not relate back to the 1977 complaint. App. 37-39. The employees did not appeal this holding to the Fourth Circuit.

1983), the court below held the six month statute of limitations prescribed in Article 49B, § 9(a) was not applicable. App. 19. In *McNutt*, a case decided by another panel of the Fourth Circuit a few weeks prior to oral argument in this case, the court had concluded that Art. 49B §9(a) should not be applied to a private employee's claim of racial discrimination brought under 42 U.S.C. § 1981, because the "mixed scheme of administrative and judicial enforcement" in Article 49B was not analogous to a judicial action brought to enforce § 1981. 698 F.2d at 678.

In urging the Fourth Circuit to apply § 9(a) in the case at hand, the State pointed out, *inter alia*, that the present case, unlike *McNutt*, involved a public, rather than private employee and that the *McNutt* panel had expressly recognized that the policy reasons supporting prompt assertion and prompt resolution of public employee "controversies over discharges, demotions and failures to promote or transfer" were "particularly" acute. 698 F.2d at 678. Further, the State noted that the *McNutt* panel had reached its view that federal courts can only borrow state limitations periods which provide the *plaintiff* with a purely judicial remedy without reference to this Court's decision in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981). Even though the employees offered no response to these arguments, the lower court rejected them without comment.

The court below also refused to apply other abbreviated limitations periods urged by the State — limitations periods of precisely the sort which the *McNutt* panel had indicated would be applicable in federal civil rights actions. The *McNutt* court had concluded that there was no indication that the Maryland legislature intended the six-month limitations period found in Article 49B § 9(a) to be applied to other types of judicial actions involving

private employees: "No Maryland statute specifically addresses the matter" and there is no "decision or body of decisions on the subject in Maryland." 698 F.2d at 679. However, the *McNutt* court said that if there had been such evidence of state intent, it would have applied a short limitations period: "Had there been in Maryland a decision or body of decisions on the subject . . . we would probably accept them as the common law of the State of Maryland" and apply them pursuant to 42 U.S.C. § 1988. 698 F.2d at 679.

The State argued below that in a case involving a public employee, there are both statutes and common law which do, in the words of the *McNutt* panel, "specifically address the matter." Petitioners pointed to a wide body of Maryland statutes and regulations providing public employees their own administrative and judicial forum to challenge a discharge by their public employer — all within abbreviated limitation periods, as well as an established common law of Maryland requiring a public employee to assert his employment dispute in court in an expeditious fashion. *See Duffey v. Rickard,* 194 Md. 228, 71 A.2d 41 (1950) (five and one-half months).

The employees' only response was to argue that these statutes and case law did not apply to them because they were not merit system employees. The Fourth Circuit, however, did not reject the statutory and common law limitations periods for public employment disputes on this ground. Rather the court concentrated simply on the length of the limitations periods, noting twice in the space of two paragraphs that these periods were "even shorter" than the period rejected in *McNutt.* App. at 20. 710 F.2d at 162.[8] The Court then made its own independent and conclusory assessment of the "intent" of the Maryland

[8] The author of the Fourth Circuit opinion also suggested at oral argument that the proffered limitations periods were too short.

legislature and found that even though abbreviated limitations periods were mandated by statutes and case law governing the rights of public employees, the legislature could not have "intended" that a limitations period of this brevity be applied "to civil actions for discrimination." App. at 20. 710 F.2d at 162.[9] Accordingly, the Court held that the general limitations period of three years for actions for which no other period is specifically provided, Maryland Code, Courts & Judicial Proceedings Art. § 5-101, should be applied in "discrimination suits brought under the Civil Rights Acts by employees in public as well as private employment." App. 21. 710 F.2d at 163.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Fourth Circuit erroneously concluded that a Maryland three year statute of limitations for actions for which no other period is provided, should be applied by a federal court in a public employee's suit alleging employment discrimination brought under the Civil Rights Acts rather than the six month period which Maryland law specifically mandates for all employment discrimination complaints filed with the State Human Relations Commission.

Applicable Legal Principles

Under 42 U.S.C. § 1983 and related civil rights statutes, federal courts are generally required to borrow the statute of limitations governing the most analogous state cause of action. *Board of Regents v. Tomanio,* 446 U.S. 478 (1980). This limitations period can be disregarded only if "inconsistent with the Constitution and laws of the United

[9] The Fourth Circuit rejected the State's alternative argument that the employees' claims of race and sex discrimination first raised in their 1981 complaint did not "relate back" to the 1977 complaint and so were not timely filed even if a three year limitations period were applicable. App. 22. 710 F.2d at 163.

States." 42 U.S.C. § 1988. In determining whether a state cause of action is most analogous to a federal civil rights claim, federal courts should analyze state law, consider the posture of the federal claim and federal policies and compare the two statutes and their effects in recognition that a more specific statute of limitations is to be preferred to a general one, that principles of federalism always play a role in § 1983 actions and that there is ordinarily no reason to reject the characterization state law would impose with respect to the federal claim. *Board of Regents v. Tomanio, supra,* 446 U.S. 478; *United Parcel Service v. Mitchell,* 451 U.S. 56 (1981); *Auto Workers v. Hoosier Cardinal Corp.,* 383 U.S. 696 (1968).

Six Months is the Limitations Period Governing the Most Analogous State Cause of Action

In the context of a public employee's civil rights claims for reinstatement and damages arising from an alleged discriminatory discharge, the federal policies involved are deterrence, compensation, *Board of Regents v. Tomanio, supra,* 446 U.S. 478, and the rapid resolution of employee disputes, particularly those involving discrimination claims of public employees. *DelCostello v. International Brotherhood of Teamsters,* 103 S. Ct. 2281 (1983); *United States ex rel. Arant v. Lane,* 249 U.S. 367 (1919); 42 U.S.C. § 2000e-5. In light of these federal policies, a Maryland court in the abstract, would analogize public employee actions under the federal civil rights laws alleging an abuse of governmental power, an unconstitutional discharge, and individual liability on the part of the perpetrators and seeking to obtain reinstatement, to a mandamus action; and, in the specific context of a discrimination claim, the analogous cause of action would be one under 49B of the Maryland Code — the specific statutory remedy that displaces the employee's mandamus action. And so the statute of limitations to be borrowed in a federal civil rights action alleging employment discrimination is that contained in Article 49B, *i.e.* Section 9. The

lower court's finding that this should not be borrowed because it governed administrative proceedings is erroneous for numerous reasons. Among them are the following: (1) the six month period mandated in § 9 is a true statute of limitations, barring state judicial as well as administrative remedies, and is part of a specific statutory scheme to deter and compensate for discrimination; (2) this Court itself has turned to time limits for administrative proceedings to supply the appropriate limitations period for federal causes of action, *DelCostello v. International Brotherhood of Teamsters, supra,* 103 S. Ct. 281, and (3) if an employee pursues his remedy under Article 49B through to a state judicial proceeding, the state court's determination will collaterally estop a subsequent § 1983 or Title VII action. *Kremer v. Chemical Const. Co.,* 456 U.S. 461 (1982); *Allen v. McCurry,* 449 U.S. 90 (1980).

Application of the Six Month Limitations Period Furthers Important State Policies

Three important state policies are furthered by applying Maryland's six month limitation period in this case: (1) the strong and long recognized public policy underlying limitations periods, *e.g. Wood v. Carpenter,* 101 U.S. 135 (1979), a policy clearly not "disfavored in federal law" in general, *Board of Regents v. Tomanio, supra,* 446 U.S. at 448, nor in civil rights actions in particular, *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 464 (1975); (2) the well established policy favoring prompt assertion and resolution of public employment disputes, *Nicholas v. United States,* 257 U.S. 71, 75 (1921); *United States, ex rel. Arant v. Lane, supra,* 249 U.S. at 372; *Duffey v. Rickard,* 194 Md. 228, 71 A.2d 41 (1950), *Annot:* Acquiescence or Delay as Affecting Rights of Public Employees Illegally Discharged, Suspended or Transferred, 145 A.L.R. 767 (1943); and (3) the policy of affording state officers as much protection as reasonable from the countless lawsuits

brought against them. *See Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

Borrowing the Six Month Limitations Period is Entirely Consistent With Federal Law and Policies

Borrowing Maryland's six month statute of limitations advances the goals of federalism, and is in no way inconsistent with or contrary to any other federal law or policy. Deterrence and compensation, which have been recognized as the principal federal policies furthered by the Civil Rights Laws, *Board of Regents v. Tomanio, supra*, 446 U.S. at 488; *Robertson v. Wegmann*, 436 U.S. 584, 590 (1978), are not hindered by application of this statute of limitations. Nor is borrowing this limitations period contrary to *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982). *See Kremer v. Chemical Const. Co., supra*, 456 U.S. 461. Finally, the limitations period is not "too short" to be applied in a federal suit; Congress has mandated equally short limitations periods to govern employee suits under Title VII, 42 U.S.C. § 2000e-5, and the National Labor Relations Act, 29 U.S.C. § 160(b), and this Court has applied limitations periods as short as this on a number of occasions. *See e.g. DelCostello v. International Brotherhood of Teamsters, supra*, 103 S. Ct. 2281; *United Parcel Service v. Mitchell, supra*, 451 U.S. 56; *Local Lodge v. National Labor Relations Board*, 362 U.S. 411 (1960); *Wheeler v. Jackson*, 137 U.S. 245 (1890).

ARGUMENT

I.

MARYLAND'S SIX MONTH LIMITATIONS PERIOD FOR FILING EMPLOYMENT DISCRIMINATION CLAIMS IS THE MOST ANALOGOUS STATE LIMITATIONS PERIOD FOR BIAS SUITS BROUGHT BY PUBLIC EMPLOYEES UNDER 42 U.S.C. § 1983 AND RELATED CIVIL RIGHTS STATUTES.

Since Congress did not establish a statute of limitations for actions brought under 42 U.S.C. § 1983 and similar

civil rights statutes,[10] federal courts are generally required to borrow the state statute of limitations governing an analogous cause of action. *Board of Regents v. Tomanio, supra,* 446 U.S. at 484. *See also, Johnson v. Railway Express Agency, Inc., supra,* 421 U.S. at 462. The state statute of limitations for the most analogous state cause of action is the "binding rule of law" in federal civil rights actions, which can be disregarded only if "inconsistent with the Constitution and laws of the United States." *Board of Regents v. Tomanio, supra,* 446 U.S. at 484-5 and 42 U.S.C. § 1988.

Unlike a number of lower federal courts, this Court has never adopted a strict formula for determining which of two state limitations periods is applicable in a federal civil rights case or which state cause of action is most analogous to the federal claim.[11] However, this Court has

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[10] Respondents below pressed claims under 42 U.S.C. §§ 1981 and 1985(3), as well as § 1983, and all of these were dismissed as untimely by the District Court. However, for the sake of simplicity in argument, and because a federal court's approach to limitations issues under these statutes would not ordinarily be expected to vary from one statute to another under 42 U.S.C. § 1988, Petitioners will principally refer to § 1983 throughout their brief. The employees also asserted a claim under 42 U.S.C. § 1986 which has its own limitations period, but which was rejected by the District Court because "inasmuch as Section 1986 is derivative of Section 1985, where a party has failed to state a timely claim under Section 1985, there is no ground for relief under Section 1986." App. 36.

[11] The "test" in the United States Court of Appeals for the Fourth Circuit was set forth in *O'Hara v. Kovens,* 625 F.2d 15, 18 (4th Cir. 1980):

> "When borrowing a state statute of limitations for federal purposes, a court should look to the statute which most clearly addresses the same or similar policy considerations as are addressed by the federal right being asserted. It is not necessary that the state statute operate in the same fashion as the federal scheme, nor is it necessary that the state statute describe a cause of action identical to the

said that the inquiry is both "heavily contingent upon an analysis of state law," *Runyon v. McCrary*, 427 U.S. 160, 181 (1976), and dependent upon "the nature of the federal claim and the federal policies involved," *United Parcel Service v. Mitchell, supra* 451 U.S. at 60-61. In essence, the district court must "characterize" the federal claim for purposes of selecting the appropriate state limitations provision, *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 706 (1966), and compare it with the analogous state court action, always recognizing that the state law that more specifically addresses the federal claim is to be favored over a general limitations period, *United Parcel Service v. Mitchell, supra*, 451 U.S. at 62; that a comparison of the "effects" of the federal and state causes of action may be more fruitful than the similarity of their procedures. *Id.* at 62, n. 3; and that there is ordinarily "no reason to reject the characterization state law would impose" with respect to the federal claim, *Auto Workers v. Hoosier Cardinal Corp., supra*, 383 U.S. at 706.

What is not critical in the analysis is that the state cause of action "fits hand in glove" with the federal claim, *United Parcel Service v. Mitchell, supra*, 451 U.S. at 64, or that the state legislature "intended" its statute of limitations to be applied in the federal context, *DelCostello v. International Brotherhood of Teamsters, supra.*, 103 S. Ct. at 2293. Finally, Petitioners submit that here, in a § 1983 action begun in state court involving state

> federal cause at issue. [Citations omitted.] There simply must be a commonality of purpose between the federal right and the state statutory scheme so that it is reasonable to subject the federal implied right to the statute of limitations provided by state law."

Some other circuits have adopted an "essential nature" test for determining the limitations period for civil rights cases. *See Sullivan v. LaMunyon*, 572 F. Supp. 753, 757 (D. Kan. 1983). Under that test, district courts "are forced to examine the factual background of the civil rights claim with an eye towards divining the 'essential nature' of that claim in state law nomenclature." *Id.*

employees, "[c]onsiderations of federalism," *Board of Regents v. Tomanio, supra,* 446 U.S. at 492, should play an important role in the equation. *See also, Warren v. Norman Realty Co.,* 513 F.2d 730, 733 (8th Cir. 1975), *cert. denied* 423 U.S. 855 (1975) ("The ultimate goal is to apply the same limitations period to the federal civil rights action as would be applied if a similar action were brought in state court.").

The lower court paid little heed to these principles. Specifically, it ignored the specificity of the state's statutory remedy for employment discrimination in order to embrace a much longer general limitations statute. It erroneously emphasized certain mechanics of the 49B remedy, mischaracterizing the statute as solely "informal, investigatory and conciliatory in nature," App. 20, rather than analyzing the state scheme for its purpose and effect, particularly with respect to the role of the individual litigant. It failed to place itself in the position of a state court facing a public employee discrimination claim. And finally, while making unsubstantiated assertions about the intent of the Maryland legislature to earmark the relevant State statutes as a limitations period, it totally ignored State policy reflected both in its common law and statutes favoring prompt assertion and resolution of public employee disputes.

The first step that should have been taken below is to inquire into the nature of the federal claims asserted and the policies that are at stake. The Respondents pressed claims of reverse race discrimination under 42 U.S.C. §§ 1981, 1983, and 1985(3) asking for reinstatement to public employment and damages from the individuals they charged for their non-renewal. Hedman also pressed a sex discrimination claim. Section 1981 proscribes discrimination on the basis of race in the making or enforcement of contracts and has developed into a broad remedy for racial discrimination in employment under which a

wrongfully discharged employee can obtain reinstatement, back pay and damages. *McDonald v. Santa Fe Truck Transporation Co.*, 427 U.S. 273, 295 (1976). Section 1983 confers no rights but creates a remedy for inadequate state protection of civil rights in order to deter future abuses of power by persons acting under color of state law and to compensate the person whose rights have been violated. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981). It too provides a remedy for a discriminatory termination of a public employee who, if successful, can obtain reinstatement, back pay and damages. Section 1985(3), like § 1983, provides no substantive rights itself, but merely furnishes a remedy for violations of protected rights. *Great American Federal Savings and Loan v. Novotny*, 442 U.S. 366 (1979). Specifically, it is aimed at conspiracies motivated by racial or class-based animus for the purpose of depriving persons of equal protection of the laws or of equal privileges and immunities under the law; and it has been held to be available to a public employee seeking back pay and damages for a conspiracy to deprive that person of equal employment opportunities. *Curran v. Portland Super. School Committee Etc.*, 435 F. Supp. 1063 (D. Maine 1977).

In the context of a public employee discharge case, the policies served by these federal statutes do not exhaust the federal policy considerations that must be considered. Federal law favors "the relatively rapid final resolution of labor disputes." *DelCostello v. International Brotherhood of Teamsters, supra*, 103 S. Ct. at 2292; *United Parcel Service v. Mitchell, supra*, 451 U.S. at 59; 29 U.S.C. § 160(b). And this is particularly true of discrimination claims against employers which under federal law must be filed within 6 months of the alleged discrimination; *see Delaware State College v. Ricks*, 449 U.S. 250, 256-57 (1980) (six month limitations period specified in 42 U.S.C. § 2000e-5(e) "while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect[s]

employers from the burden of defending claims arising from employment decisions that are long past."); and of discharges challenged by public employees. *See United States ex rel. Arant v. Lane, supra*, 249 U.S. at 372, where this Court said:

> When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the Government service may be disturbed as little as possible and that two salaries shall not be paid for a single service.

See also, Nicholas v. United States, supra, 257 U.S. at 75.

In light of these federal policies and those served by the civil rights statutes, the question becomes what state court action best characterizes Respondents' discrimination claims and best serves the policies of federal law? Petitioners submit that, in the abstract, a Maryland court would analogize public employee actions under the federal civil rights laws to remedy an unconstitutional discharge, obtain reinstatement, damages and individual liability on the part of the perpetrators to a mandamus action; and that, in the specific context of a discrimination claim, the analogous cause of action would be one under 49B of the Maryland Code — the specific statutory remedy that displaces the employee's mandamus action.

In Maryland, a mandamus action is the traditional method "to correct abuses of discretion and arbitrary, illegal, capricious or unreasonable acts" by public officers and governmental agencies, *Hecht v. Crook*, 184 Md. 271, 280, 40 A.2d 673 (1944), including those impairing personal, property or constitutional rights; including violations of the Fourteenth Amendment. *See Ness v. Baltimore*, 162 Md. 529, 160 At. 8 (1932); *Heaps v. Cobb*,

supra, 185 Md. 372, 379, 45 A.2d 73. Like § 1983 and § 1985(3), it does not create rights, but merely provides a mechanism for their enforcement. *Jones v. House of Reformation*, 176 Md. 43, 3 A.2d 728 (1939). Like § 1983, it provides a specific remedy where existing State remedies are found lacking. *Compare McNeese v. Board of Education*, 373 U.S. 688 (1963) with *Harwood v. Marshall*, 9 Md. 83, 98 (1856) (Mandamus "ought to be used upon all occasions where the law has established no specific remedy, and where, in justice and good government, there ought to be one.").[12]

Since before the Civil War, mandamus has furnished a damage remedy in Maryland against erring public officials. *See* Chapter 285, Laws of 1858; Maryland Rule BE44. Just as under the federal civil rights laws, a whole body of law has arisen as to when a public officer is subject to or immune from damage liability in a mandamus action. *See* Annotation: Mandamus — Allowance of Damages, 73 ALR2d 903 at § 5 (1960).[13] And some courts even allow the recovery of attorney's fees against public officers in a successful mandamus action. *Id.* at § 4(e); cf. *Missouri P. R. Co. v. Larabee*, 234 U.S. 459 (1914). Finally, at least since 1888 Maryland courts have been able to grant injunctive relief in a mandamus proceeding. See Chapter 454, Laws of 1888; Maryland Rules BF1 et seq. In short, deterrence of abuses of power by governmental

[12] In Maryland, mandamus is no longer considered a prerogative writ. *Pressman v. Elgin*, 187 Md. 446, 451, 50 A.2d 560 (1947).

[13] In cases collected in this annotation, courts have considered the officer's good faith and motivation as well as the plain nature of the duty sought to be enforced. *Compare* 73 A.L.R.2d at § 5 *with Procunier v. Navarette*, 434 U.S. 555, 562 (1978) (Public officer is liable under 42 U.S.C. § 1983 if he acts with such disregard of the plaintiff's "clearly established constitutional rights" that his action cannot reasonably be characterized as being in good faith.).

officers and compensation for deprivation of rights is as much a part of the Maryland remedy of mandamus as it is of 42 U.S.C. § 1983.[14]

Traditionally in Maryland, mandamus has been the remedy resorted to by public officers and employees to challenge an illegal removal and to win reinstatement. *See Harwood v. Marshall, supra,* 9 Md. at 99; *Forami v. Reynolds,* 248 Md. 246, 236 A.2d 20 (1966). However, the Court of Appeals of Maryland, like this Court, *see United States ex rel. Arant v. Lane, supra,* 249 U.S. 367 and the courts of most other states, *see Annotation:* Acquiescence or Delay as Affecting Rights of Public Employees Illegally Discharged, Suspended or Transferred, 145 A.L.R. 767 (1943), has adopted a strict, policy-based rule of laches in such cases that requires a public employee to promptly assert his rights.[15] *Duffey v. Rickard, supra,* 194 Md. 228, 71 A.2d 41. In the *Duffey* case, Maryland's highest court held that a discharged public employee who had delayed five and one-half months before pressing his claim for restoration to his job was prohibited by laches from bringing a mandamus action. Thus, under Maryland law, a mandamus action not only serves the policies embodied in 42 U.S.C. § 1983, but also the federal interest in the prompt resolution of public employee disputes.[16]

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[14] A different conclusion should not be drawn with respect to 42 U.S.C. § 1985(3), because under Maryland law "the basis of conspiracy as a civil action is the doing of something which would give a right of action without the conspiracy." *Damazo v. Wahby,* 259 Md. 627, 638, 270 A.2d 814 (1970).

[15] Typically, a mandamus action, like one brought under the civil rights laws is not governed by any specific limitations period. *Annotation*: Mandamus — Statute of Limitations, 155 A.L.R. 1144 (1945). However, laches will bar such actions. *See Duffey v. Rickard, supra,* 194 Md. 228, 71 A.2d 41.

[16] Without belaboring the point, the Petitioners note that there are additional parallels between a § 1983 action and a mandamus proceeding under Maryland law. For example, mandamus, like § 1983, *Maine v. Thiboutot,* 448 U.S. 1 (1980),

In Maryland, as in other states, a mandamus action ordinarily is not available if a litigant has a plain and fully adequate alternative remedy. *Walter v. Montgomery County*, 179 Md. 665, 22 A.2d 472 (1941). And the General Assembly of Maryland has enacted comprehensive statutory schemes conferring legal and administrative rights and remedies both for state employees contesting an illegal discharge and employees alleging that their job was terminated because of race or sex. *See supra* at 5-8. These remedies displace whatever mandamus action such employees would have had, including a damage claim; *see Gray v. Warden, supra*, 247 Md. 724, 234 A.2d 603, and they represent a considered judgment by the Maryland legislature that these provisions will fully deter illegal conduct by public employees and fully compensate the employees for any violation of their rights. However, just as a mandamus remedy is not available to a public employee who waits more than six months to bring an action, so too are those remedies forfeited if a state employee similarly sits on his or her rights. To trigger the statutory procedures for remedying discrimination in employment, a complaint must be filed with the State Human Relations Commission within six months from the occurrence of the allegedly discriminatory act. Md. Code, Article 49B, § 9(a). Similarly, state employees who raise discrimination claims under the state's merit system are under strict deadlines for the assertion of their rights. *See supra* at 7-8.

Of the two statutory remedies for state employees, the most clearly analogous to Respondent's sex and reverse race discrimination claims is Article 49B. However, the

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is a remedy for statutory as well as constitutional violations. A mandamus proceeding, including a damage claim, may be heard by a jury, *see* Md. Code, Courts and Judicial Proceedings Article, § 3-8A-02 and like § 1983, may be precluded by a comprehensive statutory remedy. *Compare Preiser v. Rodriguez*, 411 U.S. 475 (1973).

lower court rejected the analogy and the six month limitations period of § 9(a) of Article 49B because it governed administrative proceedings and because it characterized the state remedy as solely "informal, investigatory and conciliatory in nature." App. 20. Not only is this a mischaracterization of the remedies available under 49B and the individual plaintiff's role in it, but it is decidedly irrelevant that the limitations period for the most closely analogous state cause of action governs administrative proceedings.

First, it is apparent that the six month period specified is a "statute of limitations." This Court characterized the similar six month rule found in 42 U.S.C. § 2000e-5 as a limitations period both in *Zipes v. TWA*, 455 U.S. 385, 398 (1982) and in *Delaware State College v. Ricks, supra*, 449 U.S. at 256-57. Moreover, failure to comply with the deadline imposed by the Maryland statute will deprive a plaintiff not only of his or her administrative remedy but of any state judicial remedy he or she would have under Article 49B or mandamus, even if the state employee claimed that his or her discharge violated the United States Constitution. *State Department of Assessments v. Clark*, 281 Md. 385, 380 A.2d 28 (1977); *Myers v. Chief of Fire Bureau*, 237 Md. 583, 589-90, 207 A.2d 467 (1965). Thus, § 9(a) is a genuine bar to a state court discrimination action by a public employee and must be characterized as a limitations period.

Second, this Court itself has turned to time limits for administrative proceedings to fashion an appropriate limitations period for federal causes of action. In *Del Costello v. International Brotherhood of Teamsters, supra*, 103 S. Ct. 2281, this Court, motivated in part by the federal policy of prompt resolution of employee disputes, adopted a six month period for filing unfair labor practice charges with the National Labor Relations Board as the most appropriate limitations period for an employee's suit

against an employer and a union for breach of a collective bargaining agreement and the union's duty of fair representation.[17] Similarly, in *Kansas City Southern Ry. Co. v. Wolf*, 261 U.S. 133 (1923), the Court adopted a time limit for filing complaints with the Interstate Commerce Commission as the appropriate limitations period for damage suits against common carriers for violating provisions of the Interstate Commerce Act. And in *United Parcel Service v. Mitchell, supra*, 451 U.S. at 61, n.3, the Court noted that an employee's state remedy that did not provide a direct entry to court, did "not mean" that it was not "closely analogous" to a federal remedy that did, provided that the state and federal remedies had the same effect.

Third, regardless of the characterization of proceedings under Article 49B, it is clear that if an employee alleging sex or race discrimination pursues that remedy unsuccessfully through a state judicial forum, it will have a collateral estoppel effect in both a subsequent § 1983 or Title VII action. *Kremer v. Chemical Const. Co., supra*, 456 U.S. 461; *Allen v. McCurry*, 449 U.S. 90 (1980).

Fourth, the lower court mischaracterized both Human Relations Commission proceedings and the aggrieved employee's role in them. Under Article 49B, an employee is not simply a bystander, he can join in a request for temporary injunctive relief if terminated; litigate his own case before the Commission; in many cases appeal from an administrative decision of no probable cause; go to court to defend a Commission decision in his favor or challenge one that is adverse to him.

Fifth, the Circuit Court paid no attention, as it should have, to the greater specificity of Article 49B over a

[17] The six month limitations period specified in 29 U.S.C. § 160(b) and adopted in *DelCostello* was the model for the six month limitations period of 42 U.S.C. § 2000e-5(e).

general limitations statute; to the purpose of Maryland's comprehensive statutory prohibition on discrimination in employment, *see* Md. Code, Art. 49B § 14, which is similar to the goal of a federal civil rights action for race and sex discrimination; or to the critical factor that the statute displaced the one common law action in Maryland that closely fit a § 1983 claim. Moreover, the lower court failed to note that Article 49B with its remedies of reinstatement, back-pay and affirmative action and with its unique feature of permitting state officers and employees, like petitioners, to be named respondents in a Commission proceeding and subsequent court action, Md. Code Art. 49B § 7(b)[18] are adequate to serve the goals of deterrence and compensation. *Cf. Bush v. Lucas*, 103 S. Ct. 2404 (1983).

Finally, by applying Maryland's six month limitations period for filing discrimination claims to federal civil rights actions based on termination of public employment allegedly for sex or race, a desirable side effect would be the achievement of a substantial degree of uniformity among such actions in the states. This is because so many other jurisdictions have adopted an identical deadline for filing fair employment practice claims. Petition for Certiorari at n.7.

For all of these reasons, Petitioners submit that the lower court erred in refusing to find a claim under Art. 49B to be the most closely analogous cause of action to Respondent's federal civil rights claims and in declining to adopt as applicable the six month limitations period contained in § 9(a) of Art. 49B.

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[18] The filing of a complaint with the Human Relations Commission naming an individual as a respondent would put that employee or officer on notice that personal liability was being sought against him or her — a point that was clearly not obvious from Respondents' EEOC complaint which named only Coppin State College as a Respondent.

II.

APPLICATION OF MARYLAND'S SIX MONTH LIMITATIONS PERIOD IN A FEDERAL CIVIL RIGHTS SUIT ALLEGING EMPLOYMENT DISCRIMINATION FURTHERS IMPORTANT STATE POLICIES AND IS ENTIRELY CONSISTENT WITH FEDERAL LAWS AND POLICIES.

Section 1988 permits federal courts in Civil Rights cases to disregard an "otherwise applicable" state statute of limitations, like Maryland's Article 49B, Section 9, "*only* if the state law is 'inconsistent with the Constitution and laws of the United States.'" (Emphasis added) *Board of Regents v. Tomanio, supra,* 446 U.S. at 485; *Robertson v. Wegmann, supra,* 436 U.S. at 588. In order to make this determination, "to gauge consistency," the "state and federal policies which the respective legislatures sought to foster must be identified and compared." *Board of Regents v. Tomanio, supra,* 446 U.S. at 487. When those policies are identified and compared in this case it is clear that the Maryland statute is not in any way inconsistent with "the Constitution or laws of the United States," and so should be applied.

There are three important state policies fostered by Article 49B, Section 9. First, it furthers the strong and long recognized public policy generally underlying limitations periods. *See e.g., Wood v. Carpenter, supra,* 101 U.S. at 135; Note, Developments in the Law — Statutes of Limitations, 63 Harv. L. Rev. 1177 (1950). As the Court noted in *Tomanio,* limitations periods are not "technicalities" but rather are "fundamental to a well-ordered judicial system." 446 U.S. at 487. Limitations periods not only protect defendants who have settled expectations that substantive claims cannot be asserted indefinitely but also produce more accuracy and reliability in the ultimate fact finding process, by ensuring that discovery and trial are undertaken when testimony is still relatively fresh. *Id.*

Moreover, the policy favoring limitations periods is clearly not "disfavored in federal law." 446 U.S. at 448. In many areas Congress has expressly enacted statutes of limitations to govern a federal claim and this Court has not hesitated to apply these limitations periods even while recognizing that such applications "make it impossible to enforce what were otherwise perfectly valid claims." *United States v. Kubrick*, 444 U.S. 111, 125 (1979). The importance which has been given the policy underlying limitations periods in federal law is further "attested to by the fact that when Congress" has created a substantive claim but "provided *no* statute of limitations for" that claim, this Court has directed that the most analogous limitations period be borrowed, *Board of Regents v. Tomanio, supra*, 446 U.S. at 488, and has repeatedly applied such a limitations period to bar tardily commenced proceedings. *E.g. Runyon v. McCrary, supra*, 427 U.S. at 180-81; *Johnson v. Railway Express, supra; O'Sullivan v. Felix*, 233 U.S. 318 (1914). Moreover, this Court has not only specifically rejected the idea that "there is anything peculiar to a federal civil rights action which would justify a special reluctance in applying" a state statute of limitations, but noted that "the express terms of 42 U.S.C. § 1988 suggest that the contrary is true." *Johnson v. Railway Express Agency, Inc., supra*, 421 U.S. at 464. *Accord, Board of Regents v. Tomanio, supra*, 446 U.S. at 485-491.

The second, equally significant state policy furthered by the Maryland statute is the prompt assertion and resolution of employment disputes by public employees. As indicated within, *supra* at 20-21, this is in fact also an important federal policy specifically recognized by this Court as long ago as 1919, *United States, ex rel. Arant v. Lane, supra*, 249 U.S. at 372, and as recently as last term, *DelCostello v. International Brotherhood of Teamsters, supra*, 103 S. Ct. at 2292, and by Congress in the National

Labor Relations Act, 29 U.S.C. § 160(b), and Title VII, 42 U.S.C. § 2000e-5. This policy is equally well established in state law. *See* Annot: Acquiescence or Delay as Affecting Rights of Public Employees Illegally Discharged, Suspended or Transferred, 145 A.L.R. 767 (1943) (collecting more than 100 cases on the subject — some going as far back as 1879) and *Duffey v. Rickard, supra,* 194 Md. 228, 71 A.2d 41. And its importance is clearly mirrored in the statutes and case law of recent years, *i.e.* not just Maryland,[19] but most states have specifically enacted an abbreviated period for the filing of claims of employment discrimination with the state fair employment practices agency. *See* Petition for Certiorari at n.7.

The third significant state policy furthered by application of Section 9 here is that of affording public officers some reasonable protection from the seemingly endless stream of unfounded, and often stale, lawsuits brought against them.[20] For example, here administrators at a small primarily black college determined in 1976 for what they believed to be good cause, A. 34-39, not to renew the contracts of two untenured white administrative employees. Now, more than seven years later, they are still defending this action in three federal law suits. "If management personnel face the added risk of personal

[19] It is worth noting that not only Article 49B and Article 64A but a host of other Maryland statutes require public employees to promptly assert their employment disputes. *See e.g.*, Annotated Code of Maryland, Article 27, § 721 and 734 (Law Enforcement Officers); Education Article § 6-202 (Teachers and Principals), § 13-1A-01 *et seq.* (University of Maryland Employees), § 14-110 (Board of Trustees of State Universities and Colleges Employees).

[20] The number of non-prisoner cases brought in the federal courts under the Civil Rights Acts increased from 296 in 1961 to 13,113 in 1977, *Butz v. Economou,* 438 U.S. 478, 526 (1978) to 17,038 in 1982. Annual Report of the Director of the Administrative Office of the United States Courts 216, Table C-2 (1982).

liability for decisions that they believe to be" correct, they will be deterred from "imposing discipline in future cases." *Bush v. Lucas, supra,* 103 S. Ct. at 2417. Moreover, this Court has repeatedly recognized:

> ". . . it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty — at a cost not only to the defendant officials, but to the society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' *Gregoire v. Biddle,* 177 F.2d 579, 581 (CA2 1949), *cert. denied,* 339 U.S. 949, 70 S. Ct. 803, 94 L. Ed. 1363 (1950)."

Harlow v. Fitzgerald, supra, 457 U.S. at 814. *Compare Wood v. Strickland,* 420 U.S. 308, 319-320 (1975).

Protecting public officers from endless unreasonable and time-consuming litigation has led the Court to afford certain public officials absolute immunity from liability for damages, *Pierson v. Ray,* 386 U.S. 547 (1967); *Imbler v. Pachtman,* 424 U.S. 409 (1976); *Briscoe v. Lahue,* 103 S. Ct. 1108 (1983); to hold a trial court's denial of absolute immunity immediately appealable as a collateral order, *Nixon v. Fitzgerald,* 457 U.S. 731 (1982); to hold there is no *respondeat superior* liability under § 1983, *Polk County v. Dodson,* 457 U.S. 312 (1981); to give other officers qualified or good faith immunity, *Scheuer v. Rhodes,* 416 U.S. 232 (1974); and to direct that this qualified immunity be decided on a motion for summary judgment with discovery withheld until that threshold question is resolved, *Harlow v. Fitzgerald, supra,* 457 U.S. at 818. Fostering of this policy in the case at hand can be accomplished by a far less radical means than that found necessary in *Pierson, Imbler,* etc., *i.e.* simple application of the most analogous state limitations period.

Not only, as demonstrated above, do three strong state policies support the application of an abbreviated limitations period here, but also — and just as clearly — application of such a limitations period is in no way inconsistent with or contrary to any federal policy.[21] One federal policy which the Court has identified as "appropriate" to consider "in adjudicating federal suits based on 42 U.S.C. § 1983" is advancing the goals of federalism. *Board of Regents v. Tomanio, supra,* 446 U.S. at 492, *citing Younger v. Harris,* 401 U.S. 37 (1971). In this case begun in State court, involving State officials and State employees this policy is, as noted within, of particular concern. Only application by a federal court of the limitations period that a state court would use in a similar action — here Article 49B, § 9 — is consistent with "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the states." *Younger v. Harris, supra,* 401 U.S. at 44, 45.

Deterrence and compensation have been recognized as the principal federal policies furthered by the federal Civil

[21] It should be noted at the outset that application of Article 49B, § 9 would clearly not discriminate against a federal cause of action. *Compare Johnson v. Railway Express Agency, supra,* 421 U.S. at 462 n. 7, and cases cited therein. Similarly, while uniformity is a federal policy which sometimes necessitates the displacement of an otherwise applicable state rule of law, *e.g., Carlson v. Green,* 446 U.S. 14 (1980), it has not been held "to warrant the displacement of state statutes of limitations for civil rights actions." *Board of Regents v. Tomanio, supra,* 446 U.S. at 489; *Robertson v. Wegmann, supra,* 436 U.S. at 594, n. 11. If the Court should reconsider this holding and find uniformity necessary and/or desirable, this uniformity could be achieved by applying the state statutes similar to Article 49B § 9, *see supra* at 27, or the six month statute of limitations applicable to employment disputes under Title VII, 42 U.S.C. § 2000e-5.

Rights Laws. *Board of Regents v. Tomanio, supra,* 446 U.S. at 488; *Robertson v. Wegmann, supra,* 436 U.S. at 590. As explained within, *supra* at 22-23, the Maryland cause of action which best serves these policies is that contained in Article 49B. Borrowing the statute of limitations applicable to actions brought under Article 49B thus would seem, by definition, to be consistent with these policies. Moreover, in *Wegmann,* the Court identified three factors which it found demonstrated that application of the state rule of law in that case would be consistent with both of these policies; significantly, all three factors are also present in the case at hand.

First, as in *Wegmann,* there is no claim made that the application of the state rule of law (here, a state limitations period) is generally inconsistent with the policies of compensation or deterrence. Indeed, Respondents could hardly make this claim, since for over 70 years the Court has held to the contrary. *O'Sullivan v. Felix, supra,* 233 U.S. at 318. Secondly, it is just as clear here as it was in *Wegmann,* 436 U.S. at 591-92, that application of the state rule of law will not automatically defeat all federal civil rights claims to which that rule is applied. Rather, "neither of these policies [deterrence and compensation] is significantly affected by" application of a limitations period since "plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence" simply by commencing their actions within the limitations period. *Board of Regents v. Tomanio, supra,* 446 U.S. at 488. Indeed, this Court's experience indicates that public employee discharge cases under federal civil rights laws can and often are brought very soon after discharge. *See e.g. New York Transit Authority v. Beazer,* 440 U.S. 568 (1979) (complaint filed within 4 months of discharge); *Elrod v. Burns,* 427 U.S. 347 (1976) (complaint filed within 3 months of discharge); *Perry v. Sinderman,* 408 U.S. 593 (1972) (complaint filed 16 days after contract not renewed).

The final factor which the *Wegmann* court pointed to as indicating application of a state law would not be inconsistent with federal policies was that several federal statutes took the same approach as the state statute:

> "The reasonableness of Louisiana's approach is suggested by the fact that several federal statutes providing for survival take the same approach, limiting survival to specific named relatives."

436 U.S. at 592 n. 8. The reasonableness of the six month limitations period provided in Maryland law is, of course, similarly demonstrated by the fact that federal statutes dealing with employment disputes "take the same approach", *i.e.*, provide a six month limitation period. *See, e.g.*, 42 U.S. § 2000e-5(e) (Title VII of the Civil Rights Law); 29 U.S.C. § 160(b) (National Labor Relations Act). Thus, borrowing Article 49B, § 9a in a federal Civil Rights suit is clearly not contrary to the "principal policies" this Court has identified as furthered by the Civil Rights Laws.

Perhaps recognizing this, Respondents have not even suggested that application of Maryland's abbreviated limitations period here would conflict with these policies. They do, however, maintain that this Court's holding in *Patsy v. Florida Board of Regents, supra*, 457 U.S. 496, that a § 1983 plaintiff need not exhaust state administrative remedies, somehow manifests a federal policy which "strongly militates against" the application of the Maryland statute. Brief in Opposition at 7. Specifically, Respondents allege, without any explanation, that application of a "very short administrative limitations period" is, like exhaustion of administrative remedies,[22] incon-

[22] The *Patsy* Court also noted the practical problems in requiring exhaustion of administrative remedies because of the troublesome issues of the "design and scope of an exhaustion

sistent with the three themes in the legislative history of the Civil Rights Act of 1871, *i.e.* (1) the paramount role of the federal courts in protecting civil rights, (2) the belief that state authorities have been unable or unwilling to protect these rights, and (3) the provision for dual or concurrent forums in the state or federal system. They are wrong. Application of the Maryland statutes will not diminish the paramount role of the federal courts in protecting the constitutional rights nor remove the federal courts as a forum (indeed "the" forum if the plaintiff chooses) if state courts are unable or unwilling to protect those rights; for dual and concurrent forums in the state or federal system would still exist.

Borrowing the Maryland statute clearly does not require federal plaintiffs to exhaust state remedies prior to proceeding in federal court. It only requires that they avail themselves of federal civil rights remedies sooner, rather than later. Indeed, while it is undoubtedly true, as the *Patsy* court found, that the Reconstruction Era "Congress was not presented with the question of exhaustion of administrative remedies, nor was it aware of the potential role of state administrative agencies," 457 U.S. at 496, and so could not have intended that a federal civil rights claimant exhaust state administrative remedies, no such claim can be made with regard to the application of an abbreviated state limitations period. In

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requirement." 457 U.S. at 513-14. These issues — types of claims to which exhaustion should apply, standards for deciding which procedures should be exhausted, tolling and limitations periods, *res judicata* effects, consequences for failure to comply with procedural requirements and whether to grant interim injunctive relief — are irrelevant to determining which limitations period is appropriate. The Maryland legislature has already answered the limitations question for employment discrimination claims. The policy reasons involved in determining whether an administrative process should go forward without interruption by federal courts involve factors entirely irrelevant to deciding the time within which the action must be filed.

fact, the 1866 Congress, rather than providing a limitations period for the civil rights statutes, provided in the predecessor to § 1988 that state limitations periods be borrowed in cases brought pursuant to those statutes at a time when abbreviated state limitations periods were not uncommon. *See e.g., O'Bannon v. Louisville, Cincinnati & Lexington Railroad,* 8 Bush (Ky.) 348 (1871) (suit against railroad — six months); *Adamson v. Davis,* 47 Mo. 268 (1871) (liability of stockholders to suit — one year); *Hanna v. Ingram,* 53 N.C. 55 (1862) (action for slander — six months); *Michel v. Tenney,* 6 La. Ann. 89 (1851) (action to annul probate sales — one year); 1826 N.C. Acts ch. 65, § 3 (6 months) (deriv. 1715 N.C. Laws) (amended to one year — but not until 1868); 1814 S.C. Publ. Stat. tit. 110, § 12 (Brevard) (six months) (deriv. St. 21 Ja. 1 c. 16; 1712 S.C. Acts 102) (amended to two years — but not until 1871); 1858 Tenn. Code § 2771 (six months) (deriv. 1715 Tenn. Acts ch. 27, § 5) (current version codified at Tenn. Code. Ann. § 28-3-102 — still six months).[23]

As this Court's decisions in *Allen v. McCurry, supra,* 449 U.S. at 98-99 and *Kremer v. Chemical Const. Co., supra,* 456 U.S. 461, make clear, the "policy" evidenced by the *Patsy* holding, while important, is, in fact, no broader than the holding itself, *i.e.,* a § 1983 plaintiff need not exhaust state remedies prior to bringing suit in federal court. The *Patsy* holding, mandated as it is by concerns that a plaintiff not be required to exhaust remedies in one forum

[23] *See also* decisions that upheld savings provisions significantly shortening the period for bringing claims not already barred, *Bigelow v. Bemis,* 2 Allen (Mass.) 496 (1861) (claims against decedent's estate — under six months); *State use of Isaac v. Jones,* 21 Md. 432 (1863) (action on constable's bond — less than one year); *DeMoss v. Newton,* 31 Ind. 219 (1869) (action for partition — 90 days); *George v. Gardner,* 49 Ga. 441 (1873) (all actions on contracts — nine and a half months); *Archambau v. Green,* 21 Minn. 520 (1875) (foreclosure of mortgage — six months); *Terry v. Anderson,* 95 U.S. 628 (1877) (actions against insolvent banks — nine and a half months).

prior to entrance to another, is more relevant to preclusion of federal remedies by state action than it is to the application of the appropriate state law rule in federal courts. Yet, in *Allen v. McCurry, supra*, the Court recognized the applicability of the same legislative history of the 1871 Act relied upon in *Patsy*, ("one strong motive" behind the enactment of § 1983 was "the grave congressional concern that the state courts had been deficient in protecting federal rights,") and nonetheless held a § 1983 action was precluded by a prior state court judgment. This holding was reaffirmed within weeks of *Patsy* in *Kremer v. Chemical Const. Corp., supra*, 456 U.S. 461, where the Court barred a Title VII claim following a state court affirmance — without a de novo judicial hearing — of an administrative proceeding. Surely, if a decision by the Maryland Human Relations Commission affirmed by a State court would be entitled to *res judicata* effect, then borrowing the limitations period from the Human Relations Commission is permissible.

Moreover, the "policy" which Respondents seek to find in *Patsy* — refusal by a federal court to borrow a state rule of law in a § 1983 case when application of that rule would deprive the plaintiff of a federal remedy — has, of course, been twice rejected by this Court. In both *Tomanio* and *Wegmann*, it was held that "a state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the § 1983 action were the only benchmark, there would be no reason at all to look at state law, for the appropriate rule would then always be the one favoring the plaintiff and its source would be essentially irrelevant." *Board of Regents v. Tomanio, supra*, 446 U.S. at 488; *Robertson v. Wegman, supra*, 436 U.S. at 593.

Finally there is no reason why the Maryland statute should not be applied to federal civil rights actions simply because it provides for an abbreviated limitations period.

The holding of the court below that six months was an "inadequate time in which to prepare a formal complaint suitable for adversary proceedings in federal court," App. 20, *see McNutt v. Duke Precision & Orthodontic Laboratories, Inc., supra,* 698 F.2d at 678-79, ignores the liberal pleading, amendment and "relation back" procedures mandated by the Federal Rules of Procedure. *Compare Burns v. Sullivan,* 619 F.2d 99, 106 (1st Cir.), *cert. denied,* 449 U.S. 893 (1980) ("Although it may take more than six months to properly prepare a civil rights case, a complaint meeting the requirement of Federal Rule of Civil Procedure 8(a) can surely be filed in that time. And amendments to the complaint and supplemental pleadings may be sought after suit is brought. Fed. R. Civ. P. 15.").

The lower court's disregard of the liberality allowed by the federal rules in concluding six months is "too short" is ironic because this case presents a paradigmatic example of plaintiffs' use (and arguably misuse) of this liberality to the fullest possible extent. When the Respondents filed their original complaint in February of 1977, they asserted only two claims: (1) non-renewal of their employment contracts in June of 1976 violated *state law* and their rights to procedural due process and (2) that in 1975 and 1976 the Petitioners obstructed "the other [non-black] race recruitment that had been advanced" by Respondents. A. 8. No claim was made of acts of race or sex discrimination. The principal relief requested was back pay; no claim for damages was made. A. 10. When, more than four (4) years later, Respondents amended their complaint, they alleged — for the first time — that they were the victims of sex and/or reverse race discrimination, detailing a panoply of incidents involving work assignments and pay never even alluded to in the 1977 complaint, occurring prior to 1975 for the most part; and now asserted that they were bringing suit pursuant to 42 U.S.C. § 1981, 1983, 1985, 1986, the First Amendment and

Title VII. A. 11-34. They now sought compensatory damages ($1,000,000) and punitive damages ($400,000). A. 23, 25, 28 and 31. Although the State argued to the contrary, the court below, in light of the liberal amendment and "relation back" permitted by Rule 15, *see Foman v. Davis*, 371 U.S. 178, 182 (1962); *United States v. Hougham*, 364 U.S. 310, 316-17 (1960), could only conclude that the "amended" 1981 complaint "related back" to 1977. However, to simultaneously suggest, as the lower court did, that a six months limitations period is "too short," defies logic.

Furthermore, the intimation that six months is "too short" is contrary to all authority. Congress has mandated an equally "short" limitations period to govern employees seeking relief under Title VII, 42 U.S.C. § 2000e-5, and the National Labor Relations Act, 29 U.S.C. § 160(b). Moreover, this Court has on any number of occasions applied limitations periods as short as that in the Maryland statute. *See, e.g., Local Lodge v. National Labor Relations Board, supra*, 362 U.S. 411 (6 months); *Wheeler v. Jackson, supra*, 137 U.S. 245 (6 months); *Arnson v. Murphy*, 109 U.S. 238 (1883) (90 days); *Tennessee v. Sneed*, 96 U.S. 69 (1877) (30 days was found to be a "wise and reasonable precaution for the security of the government"). Frequently, such "short" limitations periods have been specifically preferred to longer ones. *See e.g., United Parcel Service v. Mitchell, supra* (90 day limitations period applied in preference to a 6 year period); *Turner v. New York*, 168 U.S. 90 (1897) (6 months limitations period applied in preference to 2 year period). *See also, Johnson v. Railway Express Agency, Inc., supra* (one year limitations period applied in preference to six or ten year period); *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352 (1969) (one year limitations period applied in preference to three year period); *Canadian Northern Ry. Co. v. Eggen*, 252 U.S. 553 (1920) (one year limitations period applied in preference to six year period); *O'Sullivan*

v. Felix, supra, 233 U.S. 318 (one year limitations period applied in preference to five year period). Indeed, just last term, the Court rejected a three year statute of limitations period choosing instead to apply a six month limitations period to govern disputes between an employee and his union. *DelCostello v. International Brotherhood of Teamsters, supra,* 103 S. Ct. 2281.

Nor does the fact that this case is brought pursuant to federal civil rights laws, 42 U.S.C. §§ 1981, 1983, 1985, and 1986, somehow make it a special situation in which a six month limitations period is "too short." Quite the contrary. For Congress specifically provided that the decision as to the applicable statute of limitations in such civil rights cases is governed by 42 U.S.C. § 1988. When in 1866 Congress first enacted § 1988, providing therein that the "common law, as modified and changed by the constitution and statutes" of the states should govern civil rights actions, abbreviated state limitations periods were hardly unknown. *See supra* at 36. Surely, if Congress had been concerned that application of short limitations periods to federal civil rights claims would subvert the purposes of the civil rights laws it would have provided otherwise in § 1988. Thus, there is absolutely no authority for the proposition that the Maryland statute cannot be applied simply because it is "too short."

In sum, three important state policies will be furthered by Section 9's application in this case and its application is entirely consistent with the Constitution and laws of the United States.

CONCLUSION

The Petitioners do not here contend that a six month limitations period would necessarily be appropriate in every civil rights action, or even in discrimination actions involving private employees, or that another characterization might be made of a 42 U.S.C. § 1983 claim if different rights were at stake or facts at issue.[24] However, long standing state and federal policies justify a reasonable abbreviated limitations period in civil rights actions challenging the discriminatory discharge of a public employee. For these reasons and those set forth above, the lower court erred when it declined to follow Maryland's six month limitations period for discrimination claims and its judgment should be reversed.

Respectfully submitted,

STEPHEN H. SACHS,
Attorney General of Maryland,

PAUL F. STRAIN,
Deputy Attorney General,

DIANA GRIBBON MOTZ,
CHRISTINE STEINER,
ROBERT A. ZARNOCH,
Assistant Attorneys General,
Counsel of Record,
Seven North Calvert Street,
Baltimore, Maryland 21202,
(301) 576-6338,
Counsel for Petitioners.

[24] A much longer limitations period might be appropriate in civil rights actions based upon other kinds of constitutional violations. For example, Maryland once had an express three year statute of limitations for violations of certain State constitutional provisions that protect against physical invasion of personal and liberty interests. *See* Md. Code (1972 Repl. Vol.), Art. 57, § 1.

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